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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ALFRED CARPENTIER,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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ALFRED CARPENTIER,

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government's conduct in its ABSCAM investigation violated petitioner's right to due process of law guaranteed to him by the Constitution of the United States.

2. Whether, if such law enforcement techniques as those employed in the ABSCAM investigation are allowed, a judicial warrant is required to be obtained by the Government.

3. Whether the petitioner was entrapped as a matter of law.

4. Whether there was misjoinder and the petitioner should have been severed from the trial of his co-defendant.

5. Whether, because of all the publicity received by the ABSCAM investigation itself and the subsequent prosecutions, there should have been an individualized, *in camera voir dire* of the jury.

## PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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The petitioner, Alfred Carpentier, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS IN THE COURTS BELOW

There were no formal opinions in the United States District Court, Eastern District of New York, which was the trial court. The opinion of the Court of Appeals for the Second Circuit affirmed the conviction of the petitioner and is set forth in Appendix A.

## GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was handed down on September 20, 1982 and was entered on the same date. Jurisdiction is conferred on this Court to review the judgment in question by 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The due process clause of the Constitution of the United States is not set out herein. Pertinent portions of Title 18 U.S.C. §§201(c) and 371 are set forth in Appendix B, *infra*.

## STATEMENT OF THE CASE

This is an ABSCAM case. The petitioner, Alfred Carpentier, a businessman and a beefalo cattle farmer, charged in a three count indictment, was convicted of

charges relating to conflict of interest and conspiracy to commit bribery and was acquitted on a charge relating to the substantive crime of bribery after a jury trial. He was sentenced to a term of imprisonment of four years and a fine of $5,000.00 on the conspiracy count and to a term of imprisonment of two years, which term was suspended, and an additional fine of $5,000.00 on the conflict of interest count. Execution of sentence was stayed pending the appeal. The Court of Appeals for the Second Circuit affirmed the conviction.

Some time early in 1978, the United States Department of Justice set into operation what has become known as the "ABSCAM" investigation. The chief undercover operative for the Government was one Melvin Weinberg, a lifelong and convicted "con" man.[1] The original purpose of ABSCAM was to recover stolen paintings and certificates of deposit. It evolved, its scope expanding to include investigation of organized crime in Atlantic City, and, eventually, to ensnare corruptible politicians. The Government was now in the business of manufacturing crime; Weinberg, using the lure of hundreds of millions of dollars of Arab oil money, sought to entice various individuals to cross over the line from the legitimate to the illegal.

In the course of the operation of the ABSCAM scheme of things, Weinberg had promised to the petitioner, Alfred Carpentier, at one point, a $40,000,000.00 commission; he also continually led the petitioner on

1. The word "ABSCAM" was coined by Melvin Weinberg and derives from the first two letters of Abdul Enterprises, Ltd., a fictitious Middle Eastern business owned by two fictitious, wealthy Arab sheiks and which served as a front for the Government operation, and the word "scam", a slang expression generally used as meaning a confidence game or swindle. *See, United States* v. *Meyers*, 635 F.2d 932 (2d Cir. 1980).

with the false promise that the Arabs would buy his farm, for which petitioner had been asking a purchase price of $1,500,000.00, for $5,000,000.00.

Weinberg had relatively free reign and was unsupervised at least half of the time he was engaged in ABSCAM. In his own words, he "played by ear" much of the time. He even made decisions when to record conversations and meetings with individuals who later became ABSCAM defendants. In many instances, the FBI had to rely on Weinberg's representation as to what occurred, if he, indeed, chose to tell them at all about conversations and meetings he did not record.

In December of 1978, petitioner and his then business attorney were introduced to Melvin Weinberg by a New York bank executive. Carpentier presented a number of legitimate business deals to Weinberg for the investment of Arab money. These deals were put aside and left open by Weinberg who suggested to the petitioner that the Arabs would be more interested in deals that were not quite so legitimate.

In May of 1979, petitioner introduced a United States customs officer to Weinberg and undercover FBI agents to aid one of the "sheiks" with an immigration problem. While there were conversations in which the petitioner participated which involved the possibility of the immigration agent, Carpentier, Weinberg and another individual being paid for the agent rendering services to the sheik, the petitioner was led to believe, eventually, by Weinberg, FBI agents and the immigration agent that no service in this regard would actually be rendered by the immigration official in behalf of the sheik. A corrupt scheme was, in fact, finally developed by the immigration official, Weinberg and an undercover FBI agent to bring an Irish national, as a favor to one of the sheiks, into this country. The immigration

official was to receive payment for rendering such a service, and partial payment was made to him. It is clear petitioner Carpentier knew nothing of this corrupt scheme and received no payment in this regard.[2]

Prior to commencement of trial and three times during the course of the trial, the petitioner moved for a severance from his co-defendant (the immigration official) on the basis of the fact that the co-defendant's defense was antagonistic to the petitioner. Prejudicial joinder and misjoinder were claimed. The co-defendant's defense was basically that he had no criminal intent, he was merely investigating the "investigators" and petitioner, Alfred Carpentier. The co-defendant's defense implied accusations of Carpentier and, when this co-defendant testified on his own behalf, he made actual and specific accusations of corrupt and illegal activities of the petitioner. The trial court denied the motions each time they were made.

Previous to trial, a motion to dismiss the indictment, based on pretrial publicity, was made on behalf of the co-defendant and joined in by the petitioner. It was not so much that there was unfavorable publicity directly involving the petitioner; the more important aspect of the publicity related to the "leaks" of the ABSCAM investigation to the media from within the Department of Justice and the wide-spread coverage of

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2. The opinion of the Court of Appeals in its statement of facts gives the wrong impression in this regard. The facts addressed by the Court relating to the corrupt scheme deal only with the immigration official; in reading the opinion, one might wrongly assume Carpentier was aware of the scheme also. The $500.00 received by Carpentier from the undercover FBI agent related to a partial payment being made for reimbursement of expenses incurred by the petitioner during the course of his seeking to do other business with Weinberg and the "Arabs."

the whole ABSCAM episode. This tended to taint anyone who was charged as a result of the ABSCAM investigation.

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On appeal from the judgment of the trial court, the court of appeals affirmed petitioner's convictions on the two counts stated above. The court held that the facts in petitioner's case fell "far short of indicating conduct that would violate [his] rights pursuant to the due process clause" and that the ABSCAM operation, in this case, did not rise to the level of outrageous overinvolvement that could bar a criminal conviction (App. A, 11a, 12a).

The appeals court also held that having failed to raise the defense of entrapment below, petitioner was precluded from raising it on appeal and that, at any rate, the record indicated petitioner was predisposed to commit the crimes with which he was charged (App. A, 12a-13a). That court also found that the district court judge did not abuse his discretion in denying petitioner's motions to sever and in the manner in which the judge conducted jury selection in the case.

## REASONS FOR THE ALLOWANCE OF THE WRIT

The writ should be allowed in this case because the Court of Appeals for the Second Circuit has rendered a decision which is in conflict with decisions of other federal courts, including decisions of the Court of Appeals for the Third Circuit. Further, the Court of Appeals for the Second Circuit has decided certain important questions of federal law which have not been, but should be, settled by this Court.

1. The entire ABSCAM operation presents serious and sensitive public policy issues. *United States v. Meyers, supra*, at 934. As was specifically pointed out by the court of appeals in the petitioner's case, his "attack on the investigative procedures employed in ABSCAM raises substantial questions about the proper role of law enforcement in our society." (App. A, 15a). This Court has indicated on various occasions that those investigative procedures may at times become so intrusive as to violate an individual's due process rights, irrespective of the person's guilt or innocence and without regard to his predisposition to commit the offense with which he is charged. *United States v. Russell*, 411 U.S. 423; *Olmstead v. United States*, 227 U.S. 438.

Governmental manufacture of crime is fundamentally at odds with established principles of fair play and

due process. Police overinvolvement in the creation of crime in the ABSCAM operation encroached on the rights of all the individuals charged as a result of that covert operation. As Justice Brandeis stated:

> "In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; and invites every man to become a law unto himself; it invites anarchy. To declare in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead v. United States, supra*, at 484-85.

The function of law enforcement is the prevention of crime and the apprehension of criminals. That function should not include the manufacturing of crime. *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

While this Court has said, by plurality opinion, that police overinvolvement should not necessarily be a bar to conviction where the defendant was predisposed to commit the crime charged, specific standards to be applied to enable one to determine when such overinvolvement should serve as a bar or reach "a demonstrable level of outrageousness" were not enumerated. *Hampton v. United States*, 425 U.S. 484 (1976). The case at bar, and all the so-called ABSCAM cases, presents an opportunity to this Court to set such standards.

The Court of Appeals for the Third Circuit has held that where the Government's tactics reach a level of being creative rather than reactive in nature, where the criminal activity was initiated by the Government and no criminal enterprise had previously existed, conviction should be barred. *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978). Support for this reasoning may be found in other circuits. *United States v. Puma*, 548 F.2d 508 (5th Cir. 1977); *United States v. Reifsteck*, 535 F.2d 1030 (8th Cir. 1976); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971).

The indictment and conviction obtained in petitioner's case, as in the other ABSCAM cases, was the product of instigation by the Government. Under the fundamental fairness and totality of circumstances approach, the ABSCAM operation exceeded the police power of the federal Government. The line between lawful subterfuge and excessive governmental involvement has been crossed in this case and all the ABSCAM prosecutions, in violation of the due process clause of the Constitution.

As Judge Bryant has stated:

> "Governmental manufacture of crime . . . is as odious, and as prejudicial to a target's rights, as is the governmental snaring of the 'unwary innocent' which we term entrapment." *United States v. Richard Kelly*, Slip Op., filed May 13, 1982 at 24.

This is particularly true where the use of the primary operative, the informant (Melvin Weinberg) was, to a good extent, uncontrolled, or, at least, lacking in adequate controls. Such use of someone like Weinberg tends to corrupt the truth-seeking process. *Brown v. United States*, 602 F.2d 1073 (2d Cir. 1979). Judge Fullam found that Weinberg "represented the archetypical, amoral, fast-buck artist." *United States v. Jannotti*, 501 F.2d 1183 at 1193 (E.D.Pa. 1980). It is submitted that

the conduct of Weinberg in the context of this and all the ABSCAM cases produced a substantial danger of unreliability and was fundamentally unfair resulting in a breach of the due process rights of all the individual "targets."

The flow of publicity and the Government's conduct in this regard also violated the due process rights of the petitioner and others. The publicity in the ABSCAM cases was largely Government-inspired. This has been determined by the investigation of publicity leaks conducted by the Department of Justice. The Blumenthal Report concluded that the leaks were of a scope and magnitude unprecedented in Department of Justice history. Prosecution-inspired publicity is an abuse of the judicial system and must be held to close scrutiny by the courts. The spate of adverse publicity "poisoned the well" for ABSCAM targets and defendants, petitioner included. This publicity may well have prejudiced society in general (and jurors in particular) against anyone charged with an ABSCAM-based crime. A specific showing of prejudice is not necessary where there is a reasonable possibility of prejudice or prejudice can be assumed by the totality of the circumstances. *Murphy v. Florida*, 421 U.S. 794 (1975).

As Justice William O. Douglas has said, "The greatest battles for liberty have, indeed, been fought over the procedure which police and prosecutors may use." William O. Douglas, *Almanac of Liberty*, 1954. The ABSCAM investigations may be the greatest battlefield of all; the procedures employed by law enforcement on that battlefield warrant review of this Court.

2. The ABSCAM operation has dramatized a crucial question about all undercover police activities. Why are they not subject to a judicial warrant so that there can be some monitoring by an impartial magistrate or judge? The intrusion of an undercover agent is much

more extensive than an ordinary search. It can be continuous, long-term and unlimited. The undercover agent is a human version of an electronic eavesdropping device. Before such an electronic device is used, a warrant is required; the placement of an undercover agent into an individual's private life should also require such a warrant. Indeed, the undercover agent, set into place without a warrant and in the absence of evidence that a particular crime has been or is about to be committed, is an intrusive, general search.

3. Entrapment occurs when a person not otherwise predisposed to commit a criminal act is induced by Government agents to commit such an act. *Sorrells v. United States*, *supra*. Indicia of inducement include persuasion of an individual to participate in the commission of a criminal act, *Sherman v. United States*, *supra*, at 373; providing the instrumentalities for the commission of the crime, *United States v. Russell*, *supra*, at 431; and the creation and instigation of the crime, *Sorrells v. United States*, *supra*, at 440-441. Further, evidence at trial showed that petitioner was not aware of the particular corrupt scheme devised by the co-defendant and the Government operatives. More important, however, is the fact of the overall atmosphere created by the ABSCAM operation which, with particular reference to the petitioner, included using the inducement of a $40,000,000 commission and the purchase of petitioner's farm at a price of more than three times the value of the farm.

Melvin Weinberg, the chief Government operative, encouraged various persons to present illegitimate deals to him. Persons, like the petitioner, induced by vast sums of money, eventually discussed such deals with Weinberg and became "targets" of ABSCAM. Evidence of the inducements put before the petitioner by the Government were brought out in both the Government's case and the

petitioner's defense case. Once such inducement was established *prima facie*, the burden should then have been upon the prosecution to prove that the petitioner was ready and willing, without persuasion, to engage in criminal conduct. The prosecution, at trial of petitioner's case, did not prove the requisite propensity of the petitioner. It is maintained that the Government was bound to do this even in light of the fact that the petitioner did not raise the specific defense of entrapment. Failure to establish this propensity of the petitioner is sufficient to bar his conviction.

4. Prior to the commencement of trial and on three occasions during the course of the trial, petitioner moved for severance from his co-defendant based on misjoinder of defendants. The joinder of the defendants in one trial was unduly prejudicial because petitioner's co-defendant's defense was totally antagonistic to the defense and interests of the petitioner. In the already sensitized atmosphere of an ABSCAM prosecution, such a claim takes on even greater significance.

It was an abuse of discretion of the trial court to refuse to grant the motion for severance when it was clear that the theory of the co-defendant's defense was in direct conflict with petitioner's defense. A major premise of petitioner's co-defendant's defense was that he was investigating the petitioner; such a defense created a danger that the jury would unjustifiably infer that this conflict alone demonstrated that both defendants were guilty. In short, it created a situation where the jury was more likely to find guilt on the part of the petitioner Carpentier. A separate trial of the petitioner would have better secured a fair trial. *See generally, United States v. Wilson*, 500 F.2d 715 (5th Cir.), *cert. denied*, 420 U.S. 977 (1974); *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973).

5. As set forth above, the publicity in this case was extraordinary. Under the circumstances, there should have been a liberal use of individualized *in camera voir dire* in this case and all the ABSCAM cases. Such a view is expressed in the American Bar Association's "Standards Relating to the Administration of Justice: Free Press and Fair Trial."

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 15, 1982

Respectfully submitted,

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